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JOHN T. FEY, Clerk

No. ~~581~~ 10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF
OHIO,

Appellee.

MOTION TO DISMISS

WILLIAM SAXBE,
Attorney General.

JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

CARLTON S. DARGUSCH, SR.,
33 North High St., Columbus 15, Ohio,
Attorney for Appellant.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 589

ALLIED STORES OF OHIO, INC.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF
OHIO,

Appellee.

MOTION TO DISMISS

Appellee, pursuant to Rule 16 (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the grounds that no substantial federal question is presented thereby, and that the decision of the Supreme Court of Ohio, from which appeal was taken, rests upon adequate nonfederal grounds.

STATEMENT OF THE CASE

The appellant corporation is organized under the laws of the State of Ohio and is engaged in the operation of retail department stores within the State of Ohio. During the years in question, appellant maintained warehouses in various cities in Ohio from which merchandise was shipped.

to the various retail stores of the appellant, or to retail customers of the appellant. No manufacturing nor processing of any kind was conducted in connection with the storage of appellant's merchandise during the time that it was retained in warehouses.

The statutes drawn in issue in this appeal are Section 5701.08, Revised Code of Ohio* (Title 57, *Page's Ohio Revised Code Annotated*, page 13; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 5), which provides in full:

"As used in Title LVII of the Revised Code:

"(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a non-resident of this state is not used in business in this state if held in a storage warehouse for storage only. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

"(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations."

and Section 5709.01, Revised Code of Ohio (Title 57, *Page's Ohio Revised Code Annotated*, page 78; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 40), which provides in full:

"All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in busi-

ness in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property."

The Supreme Court of Ohio, by decision of January 30, 1957, ruled that it was not necessary to consider the constitutional question raised by appellant, and held further that the merchandise of appellant was subject to personal property taxation as personal property used in business in Ohio.

ARGUMENT

A. The Decision of the Ohio Supreme Court Does Not Deny Appellant Equal Protection of the Laws Contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States

Section 5709.01, Revised Code of Ohio, subjects to taxation "all personal property located and used in business in this state." In determining an issue of personal property taxation, the question becomes: Is the property located in the state and is it used in business in the state?

The General Assembly of Ohio has legislatively determined that merchandise of a nonresident is not "used in business in this state if held in a storage warehouse for storage only." No doubt the basis for this legislative pronouncement was the conviction that property which was not used in business in the state in any real sense should not be taxed, and the knowledge that such property of a nonresident was ordinarily neither a product of this state nor was it destined to be committed to the commerce of this state.

The fact that the classification used to attain this end may be disputed or that its effect may be opposed by argument does not mean that it violates constitutional limitations. *Heister v. Thomas Colliery Co.*, 260 U. S., 245, 43 S. Ct., 83; *Citizens' Telephone Co. of Grand Rapids v. Fuller*, 229 U. S., 322, 33 S. Ct., 833; *Quong Wing v. Kirkendall*, 223 U. S., 59, 32 S. Ct., 192. Neither does the limitation engrafted upon the legislative power of classification by the equal protection provisions require identity of treatment. It requires only that the different treatments be not so disparate, relative to the difference in classification, as

to be wholly arbitrary. *Walters v. City of St. Louis, Mo.*, 347 U. S., 231, 74 S. Ct., 505.

In this regard the Supreme Court of Ohio held in *National Tube Co. v. Peck*, 159 Ohio St., 98, as disclosed by the sixth paragraph of the syllabus, that:

"6. The equal-protection provisions of the Constitutions do not require the state to maintain a rigid rule of taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discrimination not shown to be arbitrary or capricious do not fall within constitutional prohibitions."

In the case of *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S., 182, 65 S. Ct., 624, at page 191 of 324 U. S. this Court noted:

"It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. * * *"

There are many instances of license and tax laws which favor nonresidents. They are often based on the theory that residents use certain facilities or exercise certain privileges regularly while nonresidents use such facilities or exercise such privileges only on occasions or irregularly; an example, motor vehicle license laws. Obviously in a particular case this theory may not be borne out, but classification is necessarily based on the general, not the specific.

B. A Determination of the Federal Question Raised by Appellant Was Not Necessary in the Decision Rendered by the Ohio Supreme Court and the Decision, as Rendered, Was Based Upon Adequate Nonfederal Grounds, and Should Not Be Reviewed by This Court

The opinion of the Supreme Court of Ohio begins with this observation by Judge Taft at pages 117 and 118 of—
166 Ohio St., 116:

*"Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, 'but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only,' was void and should be stricken. * * **" (Emphasis added.)

The decision is then placed upon the basis of the limitation of the power of the court in interpretation of legislative enactments. At page 118 of the official report the following statement appears:

"Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

It thus is apparent that the basis of the decision of the Supreme Court of Ohio is a fundamental nonfederal ground: separation of powers. The recognition by the

court of its limitations and the refusal of the court to impinge upon legislative prerogatives would appear to be adequate grounds for the decision. Therefore, the decision should not be reviewed by this Honorable Court. See *Murdock v. Memphis*, 20 Wall., 590, 636; *Fox Film Corp. v. Muller*, 296 U. S., 207; *Wood v. Chesborough*, 228 U. S., 672, 676-680.

C. No Substantial Federal Question is Presented

Courts have been called upon many times to determine whether certain taxing statutes, which in specific terms or in operation do not regard all taxpayers alike, violate constitutional safeguards as to discrimination. Courts have consistently held that where discrimination between classes has not been capricious or arbitrary the statutes do not transgress the constitutional boundaries. *Walters v. City of St. Louis, Mo.*, 347 U. S., 231, 74 S. Ct., 505; *Citizens' Telephone Co. of Grand Rapids v. Fuller*, 229 U. S., 322, 33 S. Ct., 833; *National Tube Co. v. Peck*, 159 Ohio St., 98, 111 N. E. 2d, 11. The statutes in issue do not contravene constitutional guarantees.

CONCLUSION

It is respectfully submitted therefore that the decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws, that the decision is based upon adequate and independent nonfederal grounds, that no substantial federal question is presented, and that the appeal should be dismissed.

Respectfully submitted,

WILLIAM SAXBE,
Attorney General.

JOHN M. TOBIN, .
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.